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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954

No. ~~766~~ 60

LOUIS BERRA,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

## REPLY BRIEF FOR PETITIONER.

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### ARGUMENT.

1. In its memorandum in opposition to petitioner's citation of the case of **United States v. James**, 208 F. 2d 124 (C. A. 2d), the Government takes the position that the mention of petitioner's prior arrest was merely a chance remark not sought by the prosecutor. It is submitted that, without arguing the merit of such an assumption, petitioner's case for review goes far beyond such reliance;

as the record points out (R. 73, 74) the witness' referral to petitioner's prior arrest was specifically noted by the trial judge, who said (R. 74): "It is very material." At the express insistence of the trial judge the prosecutor then asked the witness specifically about the arrest (R. 74). Therefore, it would seem that the error here urged is even more prejudicial and more culpable than that which compelled the United States Court of Appeals to order a reversal and remand in the **James** case, supra.

Also, the government has sought to distinguish the **James** case, supra, on the "thin" ground suggested by the court below, namely, that the witness in the **James** case may be assumed to have been more familiar with court room rules of evidence than the witness Schmidt in the present case. The danger and the absurdity in determining an individual's right to a fair trial by the weighing of such assumptions is perfectly illustrated by the present record. The witness Schmidt was a twice-convicted felon (R. 66); therefore, should not he be assumed to have had some familiarity with the court room rules of evidence? How does such familiarity of a twice-convicted felon compare with that of a government narcotics agent? Is it more, or less, or about the same? To ask these questions is to answer them.

2. In treating the problems raised in the petition for certiorari concerning the proper application of **Commissioner v. Wilcox**, 327 U. S. 404, the government is guilty of one serious misstatement of fact totally unsupported by the record. Contrary to the statement at page 4 of the government's memorandum in opposition, the checks drawn on the Labor Health Institute's bank account and paid to Schmidt for the padded amounts were not **countersigned** by petitioner; they were **signed** by petitioner whose signature was the prime signature and petitioner's signature was countersigned by some other employee (R. 55,

120, 128). This is important in determining the petitioner's possession of the misappropriated funds; the fact that petitioner's signature was customarily countersigned would not reflect on his possession of his employer's funds, since the function of a countersignature is merely to attest the authenticity of the prime signature. (See the cases cited in Example 6, p. 22 of the Petition herein filed.) It is interesting to note also that the government finds the opinion of the court below to be correct—but for the wrong reason. In its opinion the court below found the lack of the requisite possession for embezzlement because the funds went first to Schmidt and then to petitioner (Appendix, 33, Petition); now the government seeks to base petitioner's lack of possession on the fact that his signature was countersigned—and this despite his admitted control and access to his employer's funds. This injects a line of reasoning into the case which neither court below found significant in view of the authorities cited defining the legal aspects of the countersignature requirement. Even in a case where the accused embezzler only had the right to countersign (his was not the validating signature) has the Supreme Court of Kansas held these to be sufficient possession and care for embezzlement. **State v. Johnson**, 109 Kan. 239, 199 P. 104 (1921). The defendant was president of the Railroad Men's Refining Company, a corporation. The corporation's by-laws provided that the treasurer should have custody of all the money of the corporation, and that its funds should be deposited in such bank as the directors should designate and withdrawn only upon the check or order of the treasurer "or other person designated by the management," the defendant-president being required to countersign all checks. The practice was for the defendant to sign checks drawn against the corporation's deposit, and for the bank to pay them. In rejecting the defendant's argument that he could not be convicted of embezzlement because he did not have the pos-

session or care of the money he was charged with embezzling, the Court wrote, 199 P., l. c. 106:

> "Whether or not the practice was in strict accordance with the by-laws, the conduct of the defendant is to be judged by the practical rather than the technical aspect of the matter. The funds of the company, being on deposit subject to checks signed by the defendant were in his possession and under his care in such sense as to make his appropriation of a part of them to his own use an act of embezzlement. It was not necessary to a conviction that his possession or care of the corporation's money deposited in the bank should have been exclusive."

## CONCLUSION.

For the reasons submitted herein and in the Petition for Writ of Certiorari heretofore filed, petitioner submits that the questions presented are important to the administration of justice. One question presents a direct conflict between Courts of Appeals. Another question involves the taxation of criminally obtained funds which is currently vexing the lower courts; still another question involves the mechanics of the Fifth Amendment. Lastly, the government has conceded that certiorari should be granted on the question of the misdemeanor instruction. This will involve this Court's consideration and review of the facts in the instant case; such review will raise inherently the several issues here presented. It is submitted that this question should not be considered *in vacuo*, as suggested by the government, and certiorari should be granted on the entire case.

Respectfully submitted,

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